

# CALCUTTA HIGH COURT

Nabin Majhi

Vs.

Tela Majhi

A.F.A.D. No. 1578 of 1969

(M.M. Dutt and D.C. Chakravorti, JJ.)

18.07.1978

## JUDGEMENT

### **M.M. Dutt, J.**

1. This appeal is at the instance of the defendant and it arises out of a suit for partition. The appeal involves interpretation of the New Explanation VIII which has been added to section 11 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1976.

2. The plaintiffs instituted the suit claiming partition by metes and bounds of their half share in the suit property. The principal defence of the defendant was that prior to this suit he had instituted a suit against the plaintiffs, being Title Suit No. 69 of 1961, in the First Court of the Munsiff at Rampurhat, for a declaration of his title to 10 acre of land appertaining to C. S. Plot No. 1183. In that suit, it was *inter alia* contended by the defendant that there was a previous partition. The said suit was decreed on a finding that there was an amicable partition of the suit property. It was urged by the defendant that the finding of the learned Munsiff in the said Title Suit No. 69 of 1961 would operate as *res judicata* in the present suit.

3. The learned Subordinate Judge overruled the contention of the defendant that the finding in the earlier suit operated as *res judicata* in the present suit, for he took the view that the Court of the Munsiff in which the earlier suit was instituted was not competent to try the present suit. He relied on a decision of the Supreme Court in *Mst. Gulab Bai v. Manphool Bai*<sup>1</sup>, On the merits of the case, the learned Subordinate Judge held that there was no previous partition as though the plaintiffs had a half share and the defendant had the other half, the defendant was in possession of 15 or 16 bighas of land and the plaintiffs were in possession of 7 or 8 bighas of land. The defence plea of previous partition was disbelieved by the learned Subordinate Judge. Accordingly, the learned Subordinate Judge decreed the suit in a preliminary form declaring the plaintiffs' half share in the suit property. On appeal by the defendant against the judgment and decree of the learned Subordinate Judge, the lower appellate court also took the same view and dismissed the appeal. Hence this second appeal.

<sup>1</sup> AIR 1962 SC 214

4. The principal question is, therefore, whether the present suit is barred by *res judicata*. One of

the conditions that must be fulfilled before the doctrine of *res judicata* as embodied in Section 11 of the Civil Procedure Code can be invoked is that the Court in which the former suit was instituted must be competent to try the subsequent suit. In the instant case, the former suit was instituted by the defendant in the Court of the Munsif, but the present suit has been instituted by the plaintiff's in the Court of the Subordinate Judge. It is true that in the former suit it was held by the learned Munsif that there was a previous partition of the suit property, but the learned Munsif not being competent to try the present suit, it cannot be said that the said finding operates as *res judicata* in the present suit. A similar question was raised before the Supreme Court in Gilab Bai's case (AIR 1962 Supreme Court 214) referred to above and the Supreme Court, after a review of judicial decisions on the point, held that if the trial Court was not competent to try the subsequent suit the question of *res judicata* would not arise.

5. Mr. Samarendra Kumar Dutta, learned Advocate appearing on behalf of the defendant-appellant has urged that in view of the new Explanation VIII to section 11, the question of competency of former court to try the subsequent suit has become irrelevant. The new Explanation VIII provides as follows :

"Explanation VIII - An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

It is argued by Mr. Dutta that in view of Explanation VIII, although the Court of the Munsif in the former suit was a Court of limited jurisdiction, its decision would operate as *res judicata* in the present suit. The question is whether the Court of the Munsif is a Court of limited jurisdiction within the meaning of Expln. VIII. There can be no doubt that the pecuniary jurisdiction of the Court of the Munsif is limited and that of the Court of Subordinate Judge is unlimited. But can it be said that the expression, "a Court of limited jurisdiction" refers to a Court of limited pecuniary jurisdiction? If we are to interpret Explanation VIII without referring to section 11, it may be said that a Court of limited pecuniary jurisdiction is a Court of limited jurisdiction. An explanation to a section is primarily meant for explaining the section itself. In our view, in order to ascertain the true meaning of the Explanation VIII, it has to be read along with the provision of the Section and not de hors it. It has been already stated that one of the conditions for the applicability of section 11 is that the Court in which the former suit was instituted must be competent to try the subsequent suit. If the former Court is unable to try the subsequent suit as it is beyond its pecuniary jurisdiction, the decision of the former court will not be *res judicata* in the subsequent suit. If the legislature had really intended to remove the condition relating to the competency of the former Court, in that case, it would have removed the same from the section itself. In the face of the provision of section 11 retaining the said condition for the applicability of *res judicata*, that the former Court must be competent to try the subsequent suit, it is difficult for us to accept the interpretation of Explanation VIII as suggested on behalf of the appellant.

6. What is then the meaning of the expression "a Court of limited jurisdiction"? In our view, Courts of limited jurisdiction are Courts other than the ordinary Civil Courts. These Courts are Revenue Courts, Land Acquisition Courts, Administrative Courts, Insolvency Courts, Guardianship Courts, Probate Courts etc. These Courts are to try certain specific matters and in

that sense they may be said to be Courts of limited jurisdiction. These Courts are also Courts of exclusive jurisdiction in respect of the matters they are to try. The decisions of such Courts operated as *res judicata* in subsequent suits not by virtue of section 11 but on the general principles of *res judicata*. By enacting Explanation VIII, the legislature brought the decisions of such Courts within the purview of section 11. In other words, it is not necessary now to apply the general principles of *res judicata*, but in view of Explanation VIII the decisions of the Courts of limited jurisdiction or exclusive jurisdiction will operate as *res judicata* in subsequent suits under section 11. The general principles of *res judicata* would apply where the former proceeding is not a suit but section 11 would only apply where the two proceedings are suits. Under Explanation VIII, the provision of section 11 will apply to the subsequent suit when an issue has been heard and finally decided by a Court of limited jurisdiction in a former proceeding. There is a clear indication in that regard in Explanation VIII, for it does not say that the decision of an issue by a Court of limited jurisdiction has to be made in a former suit. This is also an indication that Explanation VIII does not contemplate that the two proceedings must be suits, but as stated already, the decision has been given in a former proceeding by a Court of limited jurisdiction and not in a former suit. This excludes any argument that Explanation VIII has removed the condition of competency of the former Court finally deciding a suit or issue to try the subsequent suit. So where both the former and the subsequent proceedings are suits, to invoke the bar of *res judicata* the condition as to the competency of the former Court to try the subsequent suit must be fulfilled. If the former Court is not competent to try the subsequent suit for want of pecuniary jurisdiction, section 11 will not apply. In these circumstances, we are unable to accept the contention made on behalf of the appellant that the finding of the learned Munsif in the former suit that there was a previous partition operates as *res judicata* in the present suit for partition instituted in the Court of the Subordinate Judge, for the learned Munsif is not competent to try the present suit.

7. It appears that the plaintiffs transferred a portion of the suit property to one Chatur who was not made a party in the suit. It has been directed by the lower appellate court that the said transferee shall be added as a party at the time of the passing of the final decree, so that the allotments may be made in his presence. Further, it has been directed that, if possible, the Commissioner for Partition may allot the land specifically sold to the transferee, if equities permit the same, but if equities would not permit such allotment, the transferee may get land of equal value from the allotment of his transferor-cosharer. We do not think that non-joinder of Chatur is fatal to the suit. The direction given by the lower appellate court is quite in accordance with Justice and equity. In these circumstances, we are unable to accept the contention of the appellant that the suit should be dismissed on the ground of non-joinder of Chatur. No other point has been urged in this appeal.

8. For the reasons aforesaid, the appeal is dismissed, but as the respondents have not appeared, there will be no order for costs.

**D. C. Chakravorti, J.**

9. I agree.

Appeal dismissed.

